No. 28

In the
Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, *Petitioner*

vs.

SUPERIOR PORTLAND CEMENT, INC.,
Respondent

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW Respondent, Superior Portland Cement, Inc., herein called "Superior," and petitions for a rehearing of the above entitled cause and a clarification of the Opinion of this Court therein. This petition is based on the following grounds:

I.

Unless the Opinion of this Court and the Order to Cease and Desist of the Federal Trade Commission are clarified insofar as their application to new delivery points is concerned, it may be impossible for Superior, without danger of penalties and triple damage suits, to quote at the many new delivery points arising in the state of Washington, growing out of the new reclamation, atomic bomb and defense projects in this area. If Superior were not able to quote safely on these projects, the construction of the projects might be impeded or delayed.

II.

The Opinion of this Court and the Order to Cease and Desist of the Federal Trade Commission leaves it entirely uncertain how a company like Superior, located at a distance from its principal market, can continuously and regularly reduce its price in order to sell in that market, and thus achieve the volume necessary for survival. In particular, clarification is needed of the meaning of the following statement in the Opinion of this court (p. 39):

> "But this does not mean that Sec. 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others."

III.

The Opinion of this Court might be construed to indicate that selling, as a regular practice, at prices reflecting the mill price of the nearest mill plus freight, is in itself evidence of the employment of the multiple basing point system and illegal. Yet the Opinion also might be construed as holding that varying mill nets are discriminatory, in which case it would appear that the Robinson-Patman Act itself would require that the price of all companies at any destination be the mill price of the nearest mill plus freight.

Clarification is needed so that Superior may know whether the Robinson-Patman Act requires that all companies sell at the mill price of the nearest mill plus freight and, if so, whether compliance with that law will in itself open Superior to charges of con-

spiracy in violation of the Federal Trade Commission or Sherman Acts.

IV.

The Opinion leaves in doubt the application of the Federal Trade Commission and Robinson-Patman Acts to intra-state commerce. Clarification is important so that Superior will know whether these Acts have any application to it if it sells cement strictly in intra-state commerce and does not conspire or agree with any other company as to pricing practices.

ARGUMENT IN SUPPORT OF PETITION

The grounds upon which this petition for rehearing and clarification is based will be treated in order.

I.

The Opinion of this Court makes it impossible for Superior's attorneys to advise Superior as to how it can bid at new delivery points, and not violate the law as enunciated in the Opinion. This is of vital public importance in the Pacific Northwest, where reclamation, atomic bomb and defense projects are rapidly being developed in new territory, and new destination points are constantly arising, to which no shipments of cement have ever been made. Most of these projects are in the arid regions of central and eastern Washington. The mills in eastern Washington are small, and do not have anywhere near the capacity to supply these projects. If Superior and other western Washington mills, located at large freight disadvantages to this area, cannot quote on these projects without running the risk of penalties

and triple damage suits, the result may well be serious delay in the construction of these projects.

The Opinion of this Court appears to adopt the argument of the Federal Trade Commission that varying mill nets are a price discrimination, unless "made in good faith to meet an equally low price of a competitor" (Op., pp. 36-37). Since most of these new destination points are in areas far from Superior's plant, the quotation by Superior of its mill price plus freight to the destination point would result in a prohibitive cost of cement on these projects, and, further, would result in prices far above the prices which would be quoted by its competitors more closely located to the projects. It is obvious, then, that Superior, if it is to quote on these projects at all, must quote on a basis that will result in a lower mill net at its plant that it is receiving on other business.

We assume that under this Court's Opinion, we could reduce our price to meet any individual competitive price that we find actually quoted at the delivery point. However, in the case of a new delivery point, there will have been no price previously quoted. Are we then required to quote on mill price plus freight, without reduction? If so, it would be useless for us to bid on these projects. If we may reduce our price without violation of the law as enunciated in the Opinion of this Court, to what extent may we reduce it? There being no previous price quotations, we would have to anticipate what other mills might quote. If we were to anticipate what other mills might quote, it would be necessary for us to consider the following factors which usually would be present:

(a) The new delivery point would be much closer to some particular competitor, which we will call Mill A, than to Superior, and Superior's regular mill price, plus freight to the new delivery point, would be far higher than the price which Mill A usually charges to its customers plus freight to the new delivery point.

(b) Mill A has regularly, at other delivery points in the general area of the new point, quoted prices far under the mill price plus freight of the other cement plants in the state. Consequently, these other plants have been forced to reduce their prices at these established delivery points in this area, in order to meet the lower price of Mill A.

(c) Since the new delivery point is in an area where Mill A can charge its ordinary mill price plus freight, without the necessity of reducing its price to meet the prices of other mills, Mill A cannot justify under the Robinson-Patman Act, (assuming that this Court has held varying mill nets to be discriminatory) any quotation at the new delivery point either more or less than its mill price plus freight. Were it to quote a price higher or lower than its mill price plus freight, it would be guilty of discrimination because it would be receiving varying mill nets not caused by a good faith reduction to meet the lower price of a competitor.[1]

Bearing in mind the three factors above enumerated, it would be apparent to Superior, in the ordinary case of quoting at a new destination point, that Mill A, if it quotes at all on the invitation, must and would quote its mill price plus freight. All other mills in

[1] We omit complications arising from possible volume discounts.

the state likewise, under the above construction of the Opinion of this Court, would be required to quote their mill price plus freight, unless they can reduce their price to meet the price which it is expected that Mill A will quote at this new destination point.

Clarification of the Opinion is needed to advise Superior whether it is permissible to anticipate quotations at the new delivery point, and reduce price to meet expected prices as well as actual prices, or whether Superior must under the Robinson-Patman Act, as interpreted by the Opinion in this case, simply quote its mill price plus freight to the new destination. Superior desires to furnish cement on these highly important projects without delay, and should not be required to run the risk of penalties for violation of the Order to Cease and Desist and triple damages under the Sherman Act in order to do so.

II.

Superior is located in the mountainous regions of western Washington, approximately 100 miles from Seattle, the principal market for cement in the area. Respondent Northwestern Portland Cement Co. (the only other cement company in western Washington made a party to these proceedings) is also located in the mountainous regions far from the major consuming point. A mill operated by Permanente Cement Company is located in Seattle, and another mill operated by Olympic Portland Cement Company is located in the city of Bellingham, Washington. Neither of these latter two companies were parties to this action.

While Superior can sell some cement in areas closer to its mill, where it is not put to such a great freight cost, nevertheless, it either could not survive or would have to charge extremely exorbitant prices for cement in its own area, if it were not able to secure a large volume of production by selling in the Seattle, Bellingham, and other major markets. To sell in those markets, however, Superior must absorb large amounts of freight to meet the lower prices of the companies located at those markets. This results in a more or less permanent situation where Superior receives higher mill nets in areas where it can do so competitively, and lower mill nets in the large volume areas which it must reach in order to achieve volume production.

The Opinion of this Court states, (p. 39):

> "But this does not mean that Sec. 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others."

Does this mean that Superior must either forego the Seattle market, or reduce its prices to all customers to the extent dictated by competitive conditions in the Seattle market? Either would threaten the existence of Superior, and could well result in a higher cost of cement eventually to many of the communities now served by Superior within its own competitive advantage area.

In view of the disclaimer of the Federal Trade Commission, referred to in the Opinion of this Court (p. 42), in which they state that they do not intend to bar an individual cement producer from selling

cement at delivered prices such that the net return from one customer will be less than from another if the particular sale be made in good faith to meet the lower price of the competitor, we cannot believe that this Court meant the implication of the statement that Sec. 2(b) does not permit a seller to use a sales system which constantly results in its getting more money for like goods from some customers than it does from others. Throughout this case, the Federal Trade Commission has disclaimed that the effect of its order would be to create individual empires around each cement mill, and prevent any competition within those empires. Nevertheless, the statement of this Court above referred to, if it means that a company like Superior cannot regularly and constantly reduce its price and receive varying mill nets, in order to meet actual competitive conditions in reaching a market outside of its freight advantage area, will create empires of just that sort. If, for example, Superior meets Permanente's price in Seattle, and is required to lower its prices at intermediate points so as to derive the same mill net from all destinations, then its price in Everett, Washington, which is closer to Superior's Concrete, Washington plant than Seattle, would, of course, have to be lower than in Seattle. Permanente, located in Seattle and selling at a certain price in that city, could not sell cement in Everett without meeting the lower price of Superior in that city. It it did this, however, it would be receiving a smaller mill net from Everett than it does from Seattle, and if the construction of the statement of this Court above referred to is correct,

Permanente would then be required to reduce its Seattle price so as to derive the same mill-net as from a sale in Everett. This, in turn, however, would require Superior to reduce its Seattle price to meet Permanente's reduction and, in turn, would require a reduction in Superior's prices in Everett, which again, in turn, would make it necessary for Permanente to reduce the prices in Everett, which would again require a reduction of prices in Seattle and ad infinitum. The only practical answer to all of this would be for each mill to sell within its own area and not sell into the areas of the other mills. This would mean less competition, rather than more competition in the sale of cement and might prevent Superior from reaching the Seattle market, or prevent Permanente from selling to any destination north of Seattle.

Superior should not be required to proceed with its business, and subject itself to the possibility of penalties and triple damage suits by reason of this ambiguity in the Opinion of this Court.

III.

The two points preceding bring up the broader question of how Superior can sell at any point in competition with any other mill, without laying itself open to the charge of conspiracy to violate the Federal Trade Commission or the anti-trust laws. The Opinion of this Court states (pp. 39-40):

> "Each of the respondents whether all its mills were basing points or not, sold some cement at prices determined by the basing point formula, and governed by other base mills. Thus, all

respondents to this extent adopted a discriminatory pricing system condemned by Sec. 2. As this in itself was evidence of the employment of the multiple basing point system by the respondents as a practice, rather than to meet 'individual competitive situations', we think the Federal Trade Commission correctly concluded that the use of this cement basing point system violated the act."

However, it is obvious, from a study of the two points mentioned above, that the Robinson-Patman Act itself, if this Court has interpreted it as forbidding varying mill nets unless made in good faith to meet an equally low price of a competitor, requires that the price quoted by all cement companies at any destination be the mill price of the nearest mill plus freight. A prohibition of varying mill nets means that each cement mill must sell at a uniform mill price plus freight to the destination, unless it can point to a lower price being quoted by some other mill. Since each mill thus would be required to quote its mill price plus freight, the lowest price at the destination always would be the mill price of the nearest mill plus freight.[2] Under Sec. 2(b) every other mill would be permitted to reduce its price to meet this price. The debates in Congress on the passage of the Robinson-Patman Act indicate clearly that while

[2]We use the phrase "nearest mill" simply for convenience. There may be many situations where the mill price of a mill that is not the nearest mill is sufficiently lower than the mill price of the nearest mill so as to offset the freight differential and make the former mill the lowest price at the destination. We refer to all of these situations, however, as the "nearest mill," meaning by that term the mill whose mill price plus freight makes the lowest price at the destination.

competitors can meet the lower price they cannot cut it. Also, of course, they could not sell at a higher price (except in unusual situations, where there is a shortage of cement), because no one would buy from them. Therefore, the effect of the Opinion of this Court, if it holds varying mill nets to be discriminatory, would be that at every destination where more than one cement mill sells, all mills are required by the Robinson-Patman Act to sell at an identical price, that price being the mill price of the nearest mill plus freight.[3]

A conscientious attempt by Superior to comply with this apparent meaning of the Opinion herein, however, would cause Superior to run the risk of being held to be in violation of the law, because this Court, as above quoted, has said that the fact that a mill does sell at prices determined by the base price of other mills is in itself evidence of the conspiracy which was charged in this case. Unless clarified then, the Opinion requires Superior to run the risk of violating the Robinson-Patman Act if it does not sell at each destination at the mill price of the nearest mill plus freight, and of being held to have participated in a conspiracy to violate the Federal Trade Commission or Sherman Act if it does so sell. Certainly this Court did not intend to put Superior in any such dilemma and the Opinion should be clarified in this respect.

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[3]The term "base price" has been used by the Federal Trade Commission throughout this proceeding as identical with "mill price." Each mill in western Washington has its own mill price, which it attempts to secure in all cases where competitive conditions permit. The Federal Trade Commission has referred to this as "base price."

IV.

The Opinion leaves in doubt the question of whether Superior, if it disconnects and disassociates itself from the alleged combination and does not become a member of any other interstate conspiracy, is subject to the Federal Trade Commission and Robinson-Patman Acts when all sales are made in intra-state commerce.

Our jurisdictional objection has been overruled (Op. pp. 10-11) on the ground that the charge in the complaint and the finding of the Federal Trade Commission was that of combination, including the Cement Institute and cement companies located in different states. The *Bunte* case is not overruled. It is distinguished. Clarification is needed so that Superior may know whether it is subject to the Federal Trade Commission and Robinson-Patman Acts in the absence of participation in an interstate conspiracy.

It is to be noted that on this problem, also, the answer to point III becomes of great importance because if, due to uncertainty of application of the Robinson-Patman Act, Superior feels it necessary to comply with that Act, the uniformity of price at each destination on the basis of the mill price of the nearest mill plus freight, as apparently required by the Opinion in this case, might in itself be regarded as evidence of participation in an interstate conspiracy.

CONCLUSION

The questions posed above are ones upon which reasonable men may differ in an effort to apply the general language of the Opinion to actual marketing conditions. In the absence of a clarification of the meaning and intended application of the Opinion, it would be necessary for counsel to advise the Respondent, SUPERIOR PORTLAND CEMENT, INC., what, in their best judgment, the Opinion means. That is a responsibility we cannot shirk, because the company must continue to do business and comply in good faith with the Cease and Desist Order under advice of counsel. The company is entitled to advice as to precisely what it must cease and desist from doing in the future.

It is our opinion, after a very careful analysis of the Court's Opinion, that the maximum effect of the Opinion upon SUPERIOR PORTLAND CEMENT, INC, would be as follows:

1. That this Respondent should not belong to the Cement Institute. As a matter of fact, it has not been a member of the Institute for many years.

2. That it must not agree or conspire with any other company to create or follow a system of quoting non-competitive prices. This would require no change in Superior's practices. There is no evidence in the record of any such agreement or conspiracy on the part of Superior.

3. That it may continue to meet delivered prices of competitors actually quoted in the field and receive varying mill nets occasioned thereby, even if the

result of this is that at every destination the price of cement by all companies is the mill price of the nearest mill plus freight. We would advise Superior that under the Robinson-Patman Act, as apparently interpreted by this Court in this Opinion, the mill whose mill price plus freight makes the lowest price at any destination must quote that price and cannot quote either higher or lower unless it changes its prices to all customers. We would advise Superior, further, that the other mills may meet that price but are prohibited by the Robinson-Patman Act from under-selling it unless they reduce their price to all other customers accordingly. We would advise Superior, further, that the uniformity of quotation of identical prices at every delivery point, reflecting the mill price of the nearest mill plus freight, would not be in itself any evidence of a planned common course of action or conspiracy because it is a result required by federal law.

4. That in quoting at new delivery points it may anticipate what other compahies will bid from their prices in the surrounding area and reduce its mill net to meet the competitive price so expected.

It is in the public interest and certainly in the interest of the Federal Trade Commission that these questions be clarified now. Otherwise, grave uncertainties will continue until new cases, which are almost bound to arise, find their way up to this Court years from now. A rehearing will enable both the Federal Trade Commission and the respondents to obtain clear interpretations of the opinion which will

enable all parties to understand and comply with the mandate. A few months' delay now is preferable to years of litigation with the resulting confusion and the large risks placed on the respondents who would be required to place their own construction on these difficult and ambiguous matters at their peril.

If a petition for rehearing is not granted and a resulting clarification of the opinion does not ensue, we believe in all fairness that Superior has a right to assume that the maximum application of the opinion to it is as above stated.

Respectfully submitted,

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Attorneys for Respondent,
Superior Portland Cement, Inc.

CERTIFICATE OF GOOD FAITH

I, HERBERT S. LITTLE, one of the counsel for Superior Portland Cement, Inc., do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

DATED this 20th day of May, 1948.

HERBERT S. LITTLE